1994

Andrew Berry, Jr. v. Michael K. Coons : Reply Brief

Utah Court of Appeals

Edward T. Wells; Robert J. DeBry & Associates; Attorneys for Appellant.
Robert H. Henderson; Snow, Christensen & Martineau; Attorneys for Defendant.

IN THE UTAH COURT OF APPEALS

ANDREW BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child, Plaintiff/Appellant, vs. MICHAEL K. COONS, Defendant.	**REPLY BRIEF OF THE APPELLANT** Appeal No. 940342CA Civil No. 920600128 Priority No. 15

APPEAL FROM A FINAL JUDGMENT OF THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY, STATE OF UTAH, THE HONORABLE DAVID L. MOWER PRESIDING

EDWARD T. WELLS - A3422
ROBERT J. DeBRY & ASSOCIATES
Attorneys for Appellant
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915

ROBERT H. HENDERSON
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145-5000

IN THE UTAH COURT OF APPEALS

ANDREW BERRY, JR., as guardian for and on behalf of REYNOLD JOHNSON, III, a minor child, Plaintiff/Appellant, vs. MICHAEL K. COONS, Defendant.	)	**REPLY BRIEF OF THE APPELLANT** Appeal No. 940342CA Civil No. 920600128 Priority No. 15

APPEAL FROM A FINAL JUDGMENT OF THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY, STATE OF UTAH, THE HONORABLE DAVID L. MOWER PRESIDING

EDWARD T. WELLS - A3422
ROBERT J. DeBRY & ASSOCIATES
Attorneys for Appellant
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915

ROBERT H. HENDERSON
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145-5000

I.

TABLE OF CONTENTS

II.

TABLE OF AUTHORITIES

Statutes:

Other Authorities:

III.

INTRODUCTION

This case is the result of an auto/infant pedestrian accident that occurred on Manti's Main Street. Prior to the trial, the parties stipulated that the driver's insurance company would pay the policy limits if the jury found that the driver ("Coons") was one percent (1%) or more negligent (R. 60-62 Appellee's Brief, Ex. B). However, the jury found that the driver was not negligent (R. 213 Appellee's Brief, Ex. C).

In his opening brief, the appellant (hereinafter "Johnson" or the "Johnson child") argued that any disciplined review of the undisputed evidence shows that reasonable minds must conclude that Coons was to some degree negligent. More specifically, Johnson said that it is undisputed that Coons saw the Johnson child more than 200 feet away, Coons had a duty to slow down but did not, Coons had a duty to pay attention to the child but did not, and that had Coons slowed down or paid attention to the child, there would have been no accident.

Johnson also showed that he should be awarded a new trial because, over his counsel's objection, Coons was allowed to present sympathetic and prejudicial statements to the jury. Coons and his counsel told the jury that (1) Coons did not feel well at trial because he had suffered from a parachute accident while

serving with the 82nd Airborne Division; (2) Coons has served his country as an ex-infantry captain; and (3) Coons had suffered 13 operations and was disabled. Finally, Johnson said that twice during the trial proceedings, Coons had improper contact with members of the jury and discussed activities as mutual friends. The Court declined Coons' "Motion For a Judgment N.O.V. or in the Alternative a New Trial."

In its answering brief, Coons claims that Johnson failed to demonstrate that the evidence is insufficient to support the verdict (Appellee's brief, p.6). Coons says Johnson has not marshalled the evidence supporting the verdict. Coons also denies that he had a duty to slow down or pay attention to the child after he observed the child on the side of the road (Appellee's brief, p.5). In addition, Coons argues that Johnson waived any claim of improper jury contact because his guardian and mother witnessed the improper contact before jury deliberations but did not complain until after the jury deliberations (Appellee's brief, pp. 5, 25-29).

Further, Coons incredibly argues that there was no prejudicial testimony appealing to sympathy (Appellee's brief, p. 31). However, Coons undermines his own argument when he notes that the trial court repeatedly gave instructions that the jury was not to decide the case on sympathy. Coons then subsequently attempts to misdirect the court's attention from this issue by

arguing that "at trial [Johnson] either blessed or waived what he now condemns" (Appellee's brief, pp. 37-38). Moreover, Coons says that if there was any improper sympathetic testimony, it was Johnson's fault because "it resulted from the abusive, protracted examination of Coons by plaintiff's [Johnson's] counsel" (Appellee's brief pp. 6, 39-42). Finally, Coons claims that any trial court errors were not prejudicial. Coons' brief also contains many factual and legal misstatements.

This reply brief responds to each of Coons' foregoing arguments and the factual and legal misstatements set forth in Coons' brief.

IV.

SUMMARY OF ARGUMENT

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT BECAUSE COONS HAD A DUTY TO MAINTAIN A PROPER LOOKOUT TOWARDS THE CHILDREN AND A MARSHALLING OF THE EVIDENCE SHOWS THAT ALL REASONABLE MINDS MUST CONCLUDE THAT COONS BREACHED THE DUTY

Coons is mistaken when he alleges that he did not have a duty to maintain his lookout on the children near the side of the road (Appellee's brief, p.6). Once Coons observed the Johnson child near the side of the road, he had a duty to maintain a reasonable proper and adequate lookout. The lookout duty required Coons to recurrently reobserve and reappraise the situation. The

failure to do so is negligence. *E.g.*, Anderson v. Bradley, 590 P.2d, 329, 342 (Utah 1979).

Further, a marshalling of the evidence not in dispute unquestionably establishes that Coons did not maintain his lookout towards the children. He took his eyes off the children for two to three seconds, so that he did not observe the Johnson child crossing the road until it was too late to avoid the accident. As such, all reasonable minds must conclude that Coons was to some degree negligent.

POINT II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT BECAUSE COONS HAD A DUTY TO SLOW DOWN UPON SEEING THE CHILDREN PLAYING NEAR THE ROAD AND A MARSHALLING OF THE EVIDENCE SHOWS THAT ALL REASONABLE MINDS MUST CONCLUDE THAT COONS BREACHED THE DUTY

Coons is also mistaken when he alleges that he did not have a duty to slow down after observing the Johnson child playing on the side of the road (Appellee's brief, p. 5). The cases and statutes establishing the duty are found on pp. 19-21 of the Brief of the Appellant and will not be repeated here.

Moreover, a marshalling of the undisputed testimony shows that Coons did not slow down upon seeing the Johnson child playing near the side of the road. As such, all reasonable minds must conclude that Coons breached his duty to slow down. Therefore, there is insufficient evidence to support the verdict.

POINT III.

THE CONCLUSORY STATEMENTS AND EVIDENCE CITED IN APPELLEE'S BRIEF ARE INSUFFICIENT TO SUPPORT THE VERDICT

As set forth in Point III of this brief, the evidence cited by the Appellee in his brief either (1) does not establish one way or the other whether Coons was negligent; or (2) consists of conclusory statements made by Coons' experts in direct contradiction to their factual testimony. As such, the evidence is insufficient to support the verdict.

POINT IV.

THE JOHNSON CHILD DID NOT WAIVE HIS RIGHT TO SEEK A NEW TRIAL DUE TO THE IMPROPER ARGUMENT AND TESTIMONY OFFERED BY COONS

When Coons' counsel began to talk about Coons' military service and surgeries, Johnson's counsel promptly objected. However, because the objection was overruled, Johnson was not required to repeatedly object during the trial. To do so would have prejudiced Johnson in the eyes of the jury.

POINT V.

THE JOHNSON CHILD DID NOT WAIVE HIS RIGHT TO SEEK A NEW TRIAL ON THE BASIS THAT COONS MADE IMPROPER CONTACT WITH THE JURY

The lower court denied Johnson a new trial because Johnson's parent and guardian *ad litem* knew of Coons' improper contact with the jury prior to the verdict. However, the parent had no duty to protect the litigation rights of the child. In

addition, a guardian *ad litem* does not have the power to waive the child's litigation rights. In contrast, when Johnson's counsel learned of the improper juror contact, he timely moved for a new trial within the time allowed by Rule 59 of the Utah Rules of Civil Procedure. When confronted with the improper juror contact allegations, the lower court had a duty to protect the child as a ward of the court. Its failure to do so was reversible error.

POINT VI.

THE MISSTATEMENTS SET FORTH IN THE APPELLEE'S BRIEF DO NOT JUSTIFY THE LOWER COURT'S VERDICT AND JUDGMENT

As specifically listed in Point IV of the argument section of this brief, the misstatements set forth in the Appellee's brief do not justify the lower court's verdict and judgment because they are factually or legally incorrect.

V.

ARGUMENT

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT BECAUSE COONS HAD A DUTY TO MAINTAIN A PROPER LOOKOUT TOWARDS THE CHILDREN AND A MARSHALLING OF THE EVIDENCE SHOWS THAT ALL REASONABLE MINDS MUST CONCLUDE THAT COONS BREACHED THE DUTY

A. Appellee's Brief.

Coons maintains that he had no duty to keep his attention focused on the children playing near the side of the

road. (Appellee's brief, p. 5), and that appellant failed to marshall the evidence (Appellee's brief, p. 6).

B. Standard of Review.

Appellate courts review the existence of a duty in a negligence case under a correctness standard. *E.g.*, C.T. v. Martinez, 845 P.2d 246, 247 (Utah 1992).

C. Analysis.

Coons is mistaken when he alleges in his brief that he did not have a duty to maintain his attention on the children near the side of the road after he observed them. In Marquez v. Pepsi Cola Co., 838 P.2d 660 (Utah App. 1992), the Utah Court of Appeals surveyed the Utah appellate cases defining a motorist's duty to look out for children and those cases which held, as a matter of law, that a motorist was negligent after failing to maintain a proper lookout. The Marquez court explained that in Solt v. Godfrey, 25 U.2d 210, 479 P.2d 474, 476 (Utah 1971), the Utah Supreme Court set forth the duty of a motorist to keep a proper lookout as follows:

> Although the operator of a motor vehicle is not held as a matter of law, to be under a duty to look in a specific direction at a specific time, he must keep a lookout ahead, or in the direction in which he is traveling, or in the direction from which others may be expected to approach, and is bound to take notice of the road, to observe conditions along the way, or conditions immediately adjacent to the street, and

> to know what is in front of him for a reasonable distance.
>
> A motorist has no right to assume that the road or street is clear. He is bound to anticipate the presence thereon of other persons, vehicles or objects and children and be on the lookout for them, and act at all times so as to avoid collisions with them or injuring them.

Marques, supra at 662.

The Solt court determined that a motorist who hit a two year old child running into the street after a ball was negligent as a matter of law, Id. at 662. The court explained that the child was in plain view and that there was no sudden darting from behind anything which could have obscured the motorist's vision. Id. Similarly, the Marquez court noted that other cases wherein the courts have found negligence as a matter of law occurred when the party had a clear and unobstructed view of the persons or objects prior to the accident. See Mingus v. Olsson, 114 Utah 505, 201 P.2d 495, 498 (1949) (failed to look or, having looked, failed to see what he should have seen); Gilliland v. Rhoads, 539 P.2d 1221 (Wyo. 1975); Hallett v. Stone, 534 P.2d 232 (Kan. 1975).

Moreover at trial, Coons admitted that he owed a duty to the child to pay attention to him.

> Q: [D]on't you think it would be prudent when you're driving along and you see kids along the road to

keep your attention on them until you pass them?

A: I sure do. (Tr. Vol. I, p. 244, lines 5-8.)

In conclusion, contrary to the unsupported assertions in Coons' brief, there is absolutely no question that once Coons observed the child playing near the side of the road 200 or more feet ahead, he had a duty to pay attention to the child until he passed the child.

Johnson does not dispute that he has a duty to marshall all of the existing evidence in support of the verdict. The only lookout witness was Coons. Thus, the only evidence to marshall is Coons' testimony. That evidence is marshalled on pp. 9-12 and 23-24 of appellant's opening brief. The marshalled evidence shows that there is no factual dispute that after Coons saw the Johnson child on the side of the road, he did not continue a proper lookout. Instead, he took his eyes off of the children for two to three seconds. By the time he saw the child again, Coons was unable to avoid the accident. (Tr., Vol. I, pp. 222, 223, 219, 230 and 240).

In this appeal, Johnson has not selected parts of the record favorable to him and ignored other parts. Instead, Johnson marshalled and summarized all of the evidence on the lookout issue. The only evidence favorable to Coons was his preliminary testimony that he "was watching forward and staying in the same lane. But at

the same time I always glance at my mirrors." (Tr. Vol. I, p. 205, lines 3-19), (Appellant's brief, p. 20.) But, he went on to explain that he took his eyes off of the road for two to three seconds. Thus, a marshalling of the evidence on the lookout issue shows that all reasonable minds must conclude that Coons breached his duty to maintain a proper lookout towards the children on the side of the road. Therefore, there was insufficient evidence to support the verdict.[1]

POINT II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT BECAUSE COONS HAD A DUTY TO SLOW DOWN UPON SEEING THE CHILDREN PLAYING NEAR THE ROAD AND A MARSHALLING OF THE EVIDENCE SHOWS THAT ALL REASONABLE MINDS MUST CONCLUDE THAT COONS BREACHED THE DUTY

A. Appellee's Brief.

Coons, in his answering brief, alleges that Coons "did not have a duty to slow down" after observing the Johnson child playing on the side of the road. (Appellee's brief, p.5).

B. Standard of Review.

Whether a duty exists in a negligence case is a legal issue reviewed under a correctness standard without deference to the trial court. C. T. v. Martinez, supra. A determination of negligence becomes a question of law when the undisputed facts

---

[1]. The judgment was based solely on the jury's finding of no negligence. The jury did not reach the issue of proximate cause. (R. 213, 218-220.)

permit only one reasonable conclusion. FMA Acceptance Co. v. Leatherbury Ins. Co., 594 P.2d 1332, 1335 (Utah, 1979); Marquez v. Pepsi Cola Bottling Co., supra.

C. Analysis.

Contrary to the unsupported assertions in Coons' brief, there is also absolutely no question that Coons, upon seeing the children 200 feet away, had a duty to slow down. Cases establishing the duty are set forth in pp. 19-27 of the appellant's opening brief and will not be repeated here. The duty is also codified in Utah Code Ann. §§ 41-6-80 and 41-6-46(1).

The marshalled evidence unquestionably shows that Coons did not slow down. As explained by his accident reconstructionist, the only evidence of speed in this case is Coons' testimony. There is no objective data, there is no conflicting testimony (Tr. Vol. II, pp. 455-456). Coons testified that he was on cruise control at 30 miles per hour until he slammed on his brakes just before impact. He also testified that he did not believe it was prudent to turn off the cruise control when he first observed the children (Tr. Vol. I, pp. 235, 245, 134, 136). Moreover, all of the expert testimony at trial concluded that had Coons slowed down, Coons could have avoided the accident, because it took the Johnson child 6.1 to 7.8 seconds to cross the road and Coons only needed 3.8 to 4 seconds to stop (Tr. Vol. II, pp. 285-288, 372, 490-493).

Since a marshalling of the evidence indisputably shows that Coons breached his duty to slow down after observing the children on the side of the road, and that had he done so, the accident would have been avoided, all reasonable minds must conclude that Coons was to some degree negligent. Thus, there is insufficient evidence to support the verdict that Coons was not somewhat negligent.

POINT III.

THE CONCLUSORY STATEMENTS AND EVIDENCE CITED IN APPELLEE'S BRIEF ARE INSUFFICIENT TO SUPPORT THE VERDICT

A. Appellee's Brief.

Coons summarized what he believes to be the evidence supporting the verdict in pages 8-12 of his brief. First, Coons cites to his accident reconstruction expert's conclusion that the only thing Coons could have done to avoid the accident was to be clairvoyant. However, the factual testimony of the expert is contrary to his conclusion. Coons' expert calculated that Coons was 207 feet away when he first saw the Johnson child (Tr. Vol. II, p. 489, lines 20-25). He also acknowledged that Coons was going 30 miles per hour (Tr. Vol. II, pp. 455-466), and that the Johnson child was going 7.7 to 10.7 feet per second (Tr. Vol. II, p. 460). The expert also testified that it should have taken Coons only 43 feet, or about 2 seconds to stop from 30 miles per hour (Tr. Vol. II, p. 480). Thus, if it takes the Johnson child at least 6

seconds to cross the road (7.7 to 10.7 feet per second divided into 62 feet, the width of the road), Coons had the time to see the child, slow down and stop.

Next, Coons cites his expert's opinion that the accident was the child's fault (Appellee's brief, pp. 8-9). Of course, by law, the child cannot be at fault, and Coons' expert was well aware of the statute. (Tr. Vol. II, pp. 507-508). More importantly, whether the Johnson child was at fault is immaterial. The parties stipulated that Coons' insurance company would pay the policy limits if Coons was to any degree negligent. Establishing that the child was negligent does not mean that the driver was not also negligent.

Third, Coons points out that he testified that he was generally attentive (Appellee's brief, p. 9). However, when the specifics of his attentiveness were challenged, he admitted that he did not slow down and that he took his eyes off of the Johnson child for two to three seconds.

Fourth, Coons cites the testimony of his other accident reconstructionist, Mr. Stevens. Stevens described what, in his view, is a motorist's duty to slow down and pay attention to the child. However, expert witnesses do not establish what the legal duty is; the appellate courts do. See State v. Penya, 869 P.2d, 932, 936 (Utah 1994). Coons' duty to slow down and pay

attention to the child are correctly described in Points I and II of this brief, and pages 18-21 of the appellant's opening brief.

Subsequently, Coons cites the testimony of Roland Bagley that "the boy on the bike ran into the trailer." However, that statement neither proves nor disproves that Coons, the driver, was also negligent.

Finally, the testimony of Jamie Johnson set forth in Appellee's brief, does not poke gaping holes in the plaintiff's theory of the case. Coons testified that he first observed the Johnson child playing near the side of the road with other children.

> Q: Now as you came north did there come a time when you observed Ren Johnson over on the west side of the street at 4th North.
>
> A: Yes, but I didn't just observe--observe him. There were a lot of kids--no, I guess you wouldn't say a lot of kids. There were a couple of kids with him on the west side and they began on the north corner on the west side but then there were also some kids running around on Mrs. Johnson's property on the--the east side. (Tr. Vol. I, p. 201, lines 21-25; 202, lines 1-3.)

Thus, it is immaterial whether Johnson traveled south on the west side of the road before crossing Main Street. Coons' testimony was that, at the time of the accident, there was plenty of light and visibility was excellent. (Tr. Vol. I, pp. 200, lines

19-20; 201, lines 2-4, 19-20.) No party to this appeal has discovered or cited to any testimony showing that anything obstructed Coons' view from the time he first saw the Johnson child until the time of the collision.

B. Analysis.

The burden of showing that there is insufficient evidence to support the verdict is not much different than the showing required of a litigant successfully moving for summary judgment. A summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, *e.g.*, Jackson v. Righter, 259 U.A.R. 3 (Utah 1995). Further, the evidence is reviewed in the light most favorable to the party opposing summary judgment. Id. Similarly, an appellate court will not grant a new trial or reverse a verdict for insufficient evidence if reasonable men can draw different conclusions from conflicting evidence. Pollesche v. Transamerican Insurance Company, 27 U.2d 430, 434 497, P.2d 236 (1972). Moreover, on review, the appellate courts review the evidence in the light most favorable to the party who prevailed at trial. Marquez, supra, at 661; Hansen v. Stewart, 761 P.2d 14 (Utah 1988). The foregoing criteria are nearly identical. The difference is in a summary judgment proceeding, the court cannot weigh the testimony or the evidence submitted to it. See Singleton v. Alexander, 19 U.2d 292, 294 431 P.2d 126 (1967); Sandberg v.

Kline 576 P.2d 1291, (Utah 1978); Spor v. Crest Butte Silver Mining, Inc., 740 P.2d 1304, 1308 (Utah 1987).

Johnson has not discovered any Utah appellate court decisions considering the issue of whether conclusory testimony is sufficient to support a verdict. However, there are many Utah cases holding that conclusory testimony, standing alone, is not sufficient to either obtain or oppose a summary judgment. See, e.g., Winter v. Northwest Pipeline Corp., 820 P.2d 916, 919 (Utah 1991); Butterfield v. Okubo, 831 P.2d 97, 102-103 (Utah 1992); (affidavit must set forth the specific facts that logically support the expert's conclusion); Gaw v. State, 798 P.2d 1130, 1137 (Utah App. 1988) (expert opinion must set forth a sufficient factual basis); see also Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776, 779 (Utah 1984) (factual conclusions are insufficient).

Since the conclusory evidence cited in Coons' brief is insufficient to support or oppose a summary judgment, and since the criteria for obtaining a summary judgment and challenging a verdict for insufficient evidence are comparable, it follows that the self-serving conclusions set forth in Coons' brief are insufficient to support the verdict.

POINT IV.

THE JOHNSON CHILD DID NOT WAIVE HIS RIGHT TO SEEK A NEW TRIAL DUE TO THE IMPROPER ARGUMENT AND SYMPATHETIC TESTIMONY OFFERED BY COONS

A. Appellee's Brief.

Coons in his brief argues: (1) There was no prejudicial appeal to sympathy; (2) Coons waived the issue by not including it in his docketing statement; (3) Coons waived the issue at trial; and (4) if there was sympathetic argument and testimony, the argument and testimony was harmless (Appellee's brief, pp. 31-42).

B. Analysis.

Coons is incorrect when he says that there was no prejudicial appeal to sympathy. Telling the jury about unrelated surgeries and the suffering resulting from the surgeries, is a prejudicial appeal to sympathy. Rogers v. Owens, 440 S.W.2d, 406, 407 (Tex. App. 1968), reversed on other grounds 446 S.W.2d, 165 (Tex. 1969). So is a reference to war service, wounds or injuries. See Predovich v. New York Central R.R. Co., 175 N.E. 580, 581 (Ill. App. 1961).

Coons is also mistaken when he alleges that Johnson waived the issue at trial. When Coons' counsel started to tell the jury about Coons' parachute accident, Johnson's counsel promptly objected, but was overruled (Tr. Vol. I, p. 115, lines 2-9). This objection preserved the issue for appeal. A subsequent objection

was not necessary. See also Onyeabor v. Pro Roofing Inc., 787 P.2d, 525, 528 (Utah App. 1990) (A matter is sufficiently raised if it is submitted to the trial court and the trial court is offered an opportunity to rule on the issue). Simply put, once a party has objected and attained a ruling clearly indicating the attitude of the court, the party is not required to repeat the objection each time the issue comes up. Once the court has clearly ruled, repeated objections serve only to waste the court's time and prejudice the objecting party in the eyes of the jury. *E.g.*, United States v. Alvarez, 584 F.2d, 694, 695 (5th Cir. 1978); Ladd, "Common Mistakes in the Techniques of Trial," 22 Iowa Law Review, 609 (1937); see also State v. Johnson, 748 P.2d 1069, 1071 (Utah 1987); State v. Aquilar, 758 P.2d, 457, 458 (Utah App. 1988). Further, Johnson's subsequent acquiescence does not rise to the level of a blessing. Once the court allowed the statements about Coons' army service and surgeries and injuries, courtroom etiquette mandated deferential treatment.

Coons is also incorrect when he argues that Johnson waived the issue when he failed to include it in his docketing statement. The cases cited in Coons' brief do not support his argument. The cases all involve situations wherein the appellant either did not file a notice of appeal, a docketing statement, or failed to set forth a jurisdictional basis of the appeal.

Coons' failure to find a Utah case holding that an issue is waived if not set forth in the docketing statement is not surprising, since the primary purpose of a docketing statement is only to assist the Court in determining whether the appeal should be heard by the Utah Supreme Court or the Court of Appeals (URAP 9(b). An appellant is entitled to have the issues heard on appeal that he raised in the lower court. Issues not raised in the lower court ordinarily are not considered. *E.g.* Shire Development v. Frontier Investments, 799 P.2d, 221, 224 (Utah App. 1990). In this case, all of the appellate issues were raised in the lower court. The verdict was challenged for insufficient evidence in Johnson's Motion for a Judgment N.O.V., Or in the Alternative, a New Trial. In the same motion, Johnson asked for a new trial because of Coons' improper conduct with the jury (R. 229-252). As set forth above, Johnson timely objected to the sympathetic statements made by Coons' counsel.

POINT V.

THE JOHNSON CHILD DID NOT WAIVE HIS RIGHT TO A NEW TRIAL ON THE BASIS THAT COONS MADE IMPROPER CONTACT WITH THE JURY

A. Appellee's Brief.

Coons claims that the Johnson child may not seek a new trial based on Coons' improper conduct with the jury because Johnson's parent and guardian knew of the contact prior to the time

the jury was instructed, but the Johnson child did not object until after the verdict (Appellee's brief, pp. 25-29).

B. Analysis.

The first problem with Appellee's argument is that it does not fully explain what occurred in the lower court. The affidavit of Johnson's mother (R. 223-224, Brief of Appellant, Ex. 4) shows on August 6, she observed Michael Coons conversing with some jurors, discussing their mission and other matters. In addition, Johnson's guardian *ad litem*, and the guardian *ad litem's* legal assistant, observed Coons engaged in improper jury contact on the last day of the trial while Johnson's counsel was meeting with the court and Coons' counsel to construct jury instructions (R. 223-226, Brief of Appellant, Ex. 4). However, Johnson's counsel did not learn of the improper contact until after the jury's verdict (R. 294-295, see brief of appellee, p. 29). Upon learning of the improper contact, Johnson's counsel filed a motion for a judgment N.O.V. or, in the alternative, a new trial. Thus, the narrow issue is whether the improper contact issue is waived when an infant's parent or guardian *ad litem* learns of the improper contact prior to the verdict but the infant's counsel does not.

The second problem with Coons' argument is that none of the cases cited in his brief address this issue. None of the cases involves improper juror contact and none concerns a child plaintiff. In State v. Day, 815 P.2d, 1345, 1349 (Utah App. 1991),

the Court of Appeals held that failure to raise an objection of improper juror contact is waived when the party's counsel knew of the contact prior to the verdict, but failed to object to the trial court. In this case, Johnson's counsel met the standard. After the verdict, and upon learning of Coons' improper contact with the jury, he filed a motion for a new trial within the time limits allowed by Rule 59 of the Utah Rules of Civil Procedure.

In State v. Pike, 712 P.2d, 277 (Utah 1985), a case of improper juror contact with facts similar to the case at Bar, the trial court and counsel agreed to let the incident go until after the verdict. However, by allowing the trial court to make a decision after the trial, the appellant did not waive his right of appellate review. See Id. at 279. Thus, simply because Johnson asked the trial court to review the issue after the verdict should not operate as a waiver of the child's right of review.

Further, Coons' argument that the child should be found to have waived his right to appellate review because his guardian *ad litem* and parent knew of the misconduct prior to the verdict fails to consider the proper relationship of the parent, the guardian *ad litem*, the child and the court.[2] "Historically, the law has recognized that special rules are necessary to protect

---

[2] That relationship was explained to the trial court in Johnson's "Memorandum in Response to Order on Motions" (R. 294-298).

the legal rights of children . . .. Because of their lack of experience, judgment, knowledge, resources, and awareness, minors cannot effectively assert and protect their legal rights." Lee v. Gaufin, 867 P.2d, 572, 578 (Utah 1993). "[C]ourts have typically treated minors involved in litigation as if they were wards of the court, even when a minor has an adult representative who appears in court as a guardian *ad litem*." Id.

In this case, the lower court did not treat the child as a ward of the court. Instead, it summarily dismissed the child's claim of improper jury misconduct because the child's parent and guardian *ad litem* knew of improper contact prior to the verdict (R. 327-328). However, a parent does not have a legal duty to assert or otherwise protect a minor's legal claim. Id., at 578. Parents or natural guardians have no specific legal duty to perform and have no responsibility to their minor offspring other than their moral obligation. Scott v. School Board of Granite School District, 568 P.2d 746, 747 (Utah 1977). Thus, the court could not impose a waiver upon the child for the parent's failure to do something the parent has no duty to do. Similarly, a guardian *ad litem* cannot bind the infant by any waivers "except as to such minor matters as are necessary to facilitate the purposes of the suit and do not affect the infant's substantive rights." 42 Am. Jur. 2d Infant § 184 at 169-70 (1969).

In summary, the guardian *ad litem* had no power to waive the child's litigation rights, the parent had no duty to protect the child's litigation rights, Johnson's counsel acted in a timely fashion to protect the child's litigation rights, but the court failed in its duty to protect the child as the court's ward. The sum of the foregoing requires a new trial.

POINT VI.

THE MISSTATEMENTS SET FORTH IN THE APPELLEE'S BRIEF DO NOT JUSTIFY THE LOWER COURT'S VERDICT AND JUDGMENT

The following facts and legal misstatements set forth in Appellee's brief do not justify the lower court's verdict and judgment:

1. Appellee mistakenly alleges that this is a child dart out case. (Appellee's brief, p. 2). This is not a child dart out case. As set forth in the statement of the case section of the appellant's opening brief, unlike a dart out case, the motorist's view was not obstructed. Coons saw the child playing near the side of the road approximately 200 feet before the collision. Moreover, the child did not come from Coons' side of the road. He began crossing the road from the opposite side. Two cars in the traffic lane closest to the Johnson child were able to stop and avoid harming the child. However, Coons, traveling in the farthest lane of traffic, did not stop or avoid the accident.

2. This appeal is not based on, and never was based on, the notion that because an accident occurred, someone was negligent (Appellee's brief, pp. 5, 15). What this appeal is based on, is that all reasonable minds must conclude that Coons breached two duties of care (lookout and speed) so Coons was at least to some small degree negligent. See Points I and II of this brief.

3. The errors committed by the lower court were not harmless (Appellee's brief pp. 19-22). A judgment and verdict based upon insufficient evidence is not harmless error, it is prejudicial error, requiring a new trial. Moreover, once improper juror contact is shown, the contact is presumed prejudicial absent a satisfactory explanation. State v. Pike, supra. Finally, to show that the sympathetic statements made by Coons and his counsel were prejudicial only requires that Johnson establish that there is a reasonable likelihood that a more favorable result would have been obtained absent the sympathetic statements. The overwhelming evidence that Coons breached his duty to maintain a proper lookout and his duty to slow down, coupled with the jury's finding of no negligence and the sympathetic statements made to the jury, unquestionably establishes that there is a reasonable likelihood that a different verdict would have occurred absent the sympathetic statements.

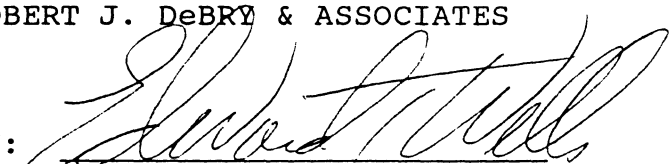
VII.

CONCLUSION

A marshalling of all of the evidence in support of the verdict unquestionably establishes that all reasonable minds must conclude that Coons was to some degree negligent. That is, Coons breached his duty to maintain a proper lookout towards the Johnson child, and he breached his duty to maintain a proper speed upon seeing the children on the side of the road. Moreover, the conclusory statements set forth in appellee's brief are insufficient to support the verdict. The Johnson child did not waive his right to obtain a new trial based upon Coons' improper contact with the jury or upon Coons' prejudicial appeal to sympathy. All of the foregoing requires either a new trial or a judgment N.O.V.

RESPECTFULLY SUBMITTED this 3rd day of April, 1995.

ROBERT J. DeBRY & ASSOCIATES

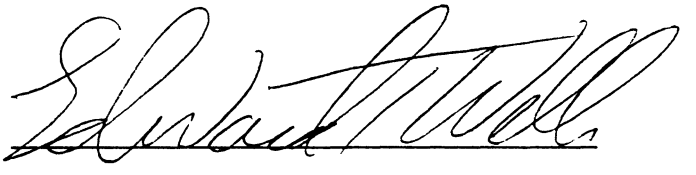
BY: 

EDWARD T. WELLS
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of April, 1995, I caused two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be mailed, postage prepaid thereon, addressed to the following:

ROBERT H. HENDERSON
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
P. O. Box 45000
Salt Lake City, UT 84145-5000



HOLLY\LIT\BERRY.RBR